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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CHARLES SKATELL et al., Plaintiffs and Appellants, v. FIRE INSURANCE EXCHANGE, Defendant and Respondent.	F042344 (Super. Ct. No. 7706) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Mariposa County. Charles V. Stone and David L. Allen, Judges.

Wilkins, Drolshagen & Czeshinski and James H. Wilkins for Plaintiffs and Appellants.

McLaughlin Sullivan, William T. McLaughlin II and Timothy R. Sullivan for Defendant and Respondent.

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STATEMENT OF THE CASE

Appellants Charles and Rita Skatell appeal from an order granting a motion for judgment notwithstanding the verdict (JNOV) brought by respondent Fire Insurance

Exchange (FIE). The order vacated a jury's punitive damage award in favor of the Skatells.

After losing their house to a wildfire in August 1996, and being dissatisfied with the service they received from, and the benefits paid by FIE, the insurer of the property,[1] appellants filed an action for breach of contract, breach of the covenant of good faith and fair dealing, negligent misrepresentation and fraud. The jury found in favor of the Skatells on their causes of action for breach of contract, breach of the covenant of good faith and fair dealing, and negligent misrepresentation, and set the damages for unpaid policy benefits in the amount of $13,320.[2] The jury found in favor of FIE on the cause of action for fraud and did not award the Skatells general damages. The jury also determined the Skatells were entitled to attorney fees in the sum of $71,595. When the jury was unable to reach a verdict with respect to the Skatells' claim for punitive damages, the trial judge, the Honorable Charles V. Stone, declared a mistrial as to that issue.

On August 5, 2002, FIE moved for a new trial and for JNOV, on the ground, in part, that there was no credible evidence to support any award of punitive damages and thus that FIE was entitled to a directed verdict on the issue without a retrial. (See Code Civ. Proc., § 629 [standards for granting a JNOV are the same as those for directing a

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1 The complaint also alleged causes of action against Richard L. Regert, appellants' insurance agent, but the jury found in favor of Regert. Appellants have appealed the subsequent judgment entered in favor of Regert and that appeal is currently pending before this court as case No. F041900. Appellants' request to consolidate the two appeals was denied. Nonetheless, appellants cite to the record in F041900 as if it were included in the record in this case. It is not. Appellants should have asked this court to take judicial notice of the pertinent parts of the record in F041900. (See Evid. Code, § 452, subd. (d); *Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1485 [judicial notice may be taken of the records of any court of this state].) On our own motion and for sake of efficiency, we will take judicial notice of the record in F041900. (*Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 578 [even if matter is a proper subject of judicial notice, it must still be relevant].)

2 The Skatells' complaint sought a total of $590,699.63 in compensatory damages.

verdict].) Judge Stone found the motion premature because all contested issues had not yet been decided. (See *Meyser v. American Bldg. Maintenance, Inc.* (1978) 85 Cal.App.3d 933, 937 [no motion for new trial or JNOV can be made until after a final judgment following a jury verdict on both liability and damages in a bifurcated trial].)

On retrial of the punitive damage claim before the Honorable David L. Allen, the jury found that FIE had engaged in despicable conduct and had subjected the Skatells to cruel and unjust hardship, all in willful and conscious disregard of their rights. The jury was unable to decide whether FIE had acted maliciously with intent to cause injury to the Skatells. The jury awarded punitive damages in the amount of $250,000. After judgment was entered, FIE again moved for JNOV on the ground that the evidence did not support an award of punitive damages and that the amount awarded was grossly unjust. On December 17, 2002, Judge Stone summarily denied FIE's earlier motion that he had said was premature. On December 27, 2002, Judge Allen granted FIE's second motion and set aside the punitive damage award.

STATEMENT OF FACTS

The Skatells owned a 165-acre parcel of land in rural Mariposa County, on which they had built a unique two-level solar home. In addition, they had four rental mobile homes on the property and several related outbuildings. Dante Skatell, appellants' quadriplegic son, occupied one of the rentals. Each of the rentals was covered by a separate insurance policy.[3]

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[3] There was a coverage dispute during the first phase of trial about whether the other structures were covered by the FIE policy, which was not resolved by the trial court but apparently was submitted to the jury. During the second phase of trial, as the need arose, the trial court did rule on some of the coverage issues. For example, the trial court determined that the policy did not cover the rental mobile homes and covered only those structures in close proximity to the residence. The Skatells also wanted policy benefits for repairs to their automobile because Charles normally made such repairs himself but, without a garage and tools after the fire, he could not do so. The trial court found that automobiles were expressly excluded from coverage.

The fire occurred on August 1, 1996. The Skatells' loss was total. Their residence was completely destroyed by the fire and very little personal property was saved. Two rental mobile homes were destroyed, although Dante's was spared. All the outbuildings were destroyed. Other than the few items they were able to rescue -- some pictures and some clothes -- the Skatells lost 35 years worth of personal possessions.

The policy purchased by the Skatells included five classifications of coverage pertinent to this appeal: 1) Coverage A: dwelling (the Skatell residence); 2) Coverage B: separate structures; 3) Coverage C: Contents; 4) Coverage D: Additional Living Expenses (ALE); and 5) Other.[4] Both ALE and debris removal are "incurred benefits," which means the covered costs must be incurred by the policy holder in order to be payable under the policy. The Skatells were paid the full policy benefits under coverages A and B.

On August 2, the Skatells notified Regert, who immediately notified FIE. On August 5, the first day they were allowed on their property, the Skatells met with Regert and FIE Claim Representative Ken Braxton. Braxton delivered advance checks of $3,500 to the Skatells for content loss and for additional living expenses.

The actual cash value of the Skatells' home was set at $100,000. The replacement cost bids ran from $173,145 to $182,493, all in excess of the policy limits under coverage A. Coverage A provided extended replacement cost, which is the stated policy limit of $126,000 plus 25 percent, or $157,500. It is undisputed the Skatells intended to rebuild, which invoked the policy's extended replacement cost benefit and not its actual cash value benefit. However, under the policy, an insured is entitled to the actual cash value immediately, subject to the rights of the mortgagor, even if the insured plans to rebuild.

It was undisputed that the Skatells' contents loss exceeded the policy limit of $94,000.

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[4] The Skatells took the position that this coverage included debris removal.

From the day of the fire until early December 1996, the Skatells lived in a motel room (first in Oakhurst, then in Mariposa) and ate most of their meals out. FIE reimbursed the Skatells for the costs of the motels, in excess of $2,000, a month, and for 60 percent of their food expenses, all pursuant to the policy's ALE coverage.[5]

Braxton informed his supervisors that he believed the Skatells were not making a reasonable effort to find a suitable temporary replacement housing. During the first few weeks, the Skatells focused on getting their rental properties back in operation. Thereafter, the Skatells looked through the local weekly paper for replacement housing but found nothing acceptable to them. Charles testified that there was always "[o]ne problem or another," primarily because Dante would not be able to access the house when visiting. Charles said the house in Bass Lake that Braxton found had three stories and was not accessible to Dante.

Rita Skatell testified that most of the properties she and Charles looked at were "too hilly," although she admitted that this is generally the topography of Mariposa County. She also said that they wanted to be as close as they could be to Dante and they never found anything acceptable when they searched the newspaper. She said the Bass Lake property was too far from Dante and that they had to be within minutes of him in case he needed them. She admitted that, after the fire, Dante lived on the property while they lived in the motels and that there was never any intention that Dante live with them in the temporary housing.

According to the Skatells, they had made reasonable efforts to find replacement housing because they had found a mobile home they wanted FIE to purchase. The Skatells thought they could live in the mobile home on the property until their house was rebuilt and then they could turn the mobile home into a rental.[6] On October 4, 1996, the

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[5] Only a percentage of the Skatells' food expenses were reimbursed because they were entitled under the policy only to "additional" living expenses.

[6] Rita testified that the two destroyed rentals were underinsured and that they used the proceeds from the policies on these rentals to upgrade one undamaged rental and to

Skatells met with Braxton and Regert and presented them with a sales agreement to purchase a good quality mobile home, which Charles "really wanted to buy." Braxton and FIE would not agree to purchase the mobile home as part of the ALE benefits. FIE explained that ALE could not be used to purchase assets and, if FIE bought the mobile home, the Skatells would have a retained value after its use as temporary housing. FIE told the Skatells they could rent a mobile home and place it on the property. Braxton told the Skatells he knew of other insureds who had lived in a 5th wheel while their residence was being rebuilt. Charles testified Rita would not live in a 5th wheel.

Braxton told the Skatells that FIE would pay them $6,600[7] and that they could use this money however they wished but that FIE would not pay anything more towards temporary living expenses. Both Skatells understood that, if they used the $6,600 to purchase a mobile home, they would receive no further ALE benefits. Rita testified that this was not a reasonable offer because "You can't buy a mobile for $6,600." As a result of this meeting, the Skatells rushed to find and purchase another mobile home within this price range (apparently the first one was no longer available).

Charles testified that, at the meeting, he had asked for the limits of the policy's ALE coverage, $63,000, and told Braxton and Regert that this would help compensate him for his loss and thus "they wouldn't have to deal with me anymore." In response, Braxton and Regert snickered and thought this was "pretty funny," which made Charles feel "humiliated." Charles admitted that Braxton was calm and polite at the meeting, but said Braxton was "also an adult, and he knows what he wants, and that's what he's going to get," that he was sticking to the policy, and that he was "not going to work with me,

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replace one destroyed rental. According to Rita, they did not have enough money to replace the second rental.

[7] Braxton testified that the amount, $6,600, was reached by taking the rental cost of the available home found in Bass Lake, $1,100 a month, and multiplying it by the number of months FIE believed it would take to rebuild the Skatells' residence from that date (up to May 1997).

not at all." Rita testified that Braxton and Regert "laughed" at Charles but were "calm and professional, like a stone." The Skatells asked FIE to cover the entire cost of the mobile home ($13,275) in a letter dated December 16. FIE refused.

There was also a dispute over the contents coverage. Although Braxton told the Skatells that it was clear their loss exceeded the policy limits, the Skatells were required to provide proof of loss, which consisted of an inventory list of what had been destroyed. The Skatells testified they worked on the list, even though it was very difficult and hurtful, almost every night. The original number of sheets provided was not sufficient, and, although the Skatells kept asking for additional sheets, FIE did not supply them. Ultimately, the Skatells simply made copies of the forms that had been provided. FIE acknowledged that completing the inventory was a difficult task. The Skatells had lost all their records in the fire. Braxton testified he needed a detailed list, for example, not just a loss identified as a "TV" but as an "R.C.A. 26-inch color console TV with remote control." The Skatells sent in three inventory lists, each one more detailed. Charles admitted the first list was not detailed. The Skatells were still working on the content list in December 1996, and the second and third lists were not submitted until early 1997, after the Skatells had hired an attorney to help them. Starting in November 1996, the Skatells asked FIE for a detailed breakdown of what FIE would pay on the content claim and what it would not. FIE did not respond.

On December 11, 1997, Farmers' Personal Property Specialist Jon Crantz sought authority for the full content coverage amount of $94,000, based on worksheets submitted by the Skatells, presumably in May 1997. On the same date, Crantz prepared a second memo requesting authority for $57,888.17 and stating the need for a better description of certain items. Branch Claims Manager William Parker testified he believed the second memo was written because Crantz still needed further clarification from the Skatells before the full amount could be paid. Parker testified that coverage was not a problem; the problem was obtaining a sufficient proof of claim to place a value on the items for which benefits would be paid. There is no other explanation for the

discrepancy. Crantz did not testify. Ultimately, FIE asked that the Skatells submit to an examination under oath. The attorney who conducted the examination reported that the Skatells were sincere, likeable people who might have exaggerated the value of their contents, but acknowledged that the proofs of loss were necessarily the product of considerable guesswork. Later, Crantz sought additional authority for another $35,611.58.

The total amount ultimately paid by FIE was $1,000.25 less than the policy limits, although the Skatells had listed items valued at approximately $15,000 more than the policy limits. Parker testified he did not think FIE denied coverage as to those items not paid, but no explanation was given for the failure to pay the full amount under the policy.

No amount was paid for debris removal related to contents. FIE said that no claims were submitted showing such costs were incurred. Charles did most of the work removing the debris himself, although he testified it was because FIE never gave him an answer to his inquiry about to how much would be paid for debris removal.[8] Braxton told the Skatells that benefits for debris removal related to contents was tied to the contents coverage and could not be paid until the contents claim was settled. Braxton told the Skatells that they would receive an additional 5 percent over the content limit for debris removal only if their contents claim exceeded the policy limit. If the contents claim were adjusted below the content limit, nothing would be paid for debris removal. Braxton testified this was a mistake, and that the policy would pay the additional 5 percent if the sum of the contents and debris removal together exceeded policy limits.

DISCUSSION

I.

Judge Allen had jurisdiction to grant the second motion for JNOV even though Judge Stone denied the first motion before Judge Allen ruled.

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[8] There was a dispute about whether removal costs would be paid for debris generated from the two rental properties not insured by FIE.

A JNOV motion is a challenge to the evidence on which the verdict is based. (*Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 750.) In bifurcated trials where different judges preside, the judge presiding over the verdict/issue being challenged should hear the motion. (See Cal. Rules of Court, rule 232.5 [rule related to motions for new trial]; Wegner, Fairbank & Epstein, Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2003) ¶ 18:25, p. 18-7 [since motions for new trial are filed at the same time as motions for JNOV, same rule presumed to apply].)

The first motion, heard on December 15, 2002, challenged the sufficiency of the evidence introduced during the *first* trial, which ended in a hung jury on the punitive damage issue. Judge Stone was asked to decide in this first motion whether there was sufficient evidence presented at the first trial to support a punitive award. He denied this motion without a statement of decision.[9] Nothing in the record suggests that Judge Stone's ruling also determined whether there was sufficient evidence presented at the *second* trial to sustain the jury's award of punitives; this was the issue decided by Judge Allen on January 7, 2003.[10] Judge Allen was the judge who presided over the retrial of

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[9] Judge Stone probably denied the first JNOV motion because it was moot -- the matter had been retried and a motion challenging the evidence presented during the retrial was before the judicial officer who presided over the retrial. It thus no longer mattered whether there was sufficient evidence presented at the first trial to allow a retrial. (See *Cobb v. University of So. California* (1996) 45 Cal.App.4th 1140, 1144 [if the jury deadlocks on some claims, while reaching a verdict on others, the action is not "final" until after retrial].)

[10] Appellants did not argue in the trial court that Judge Allen lacked jurisdiction to decide the motion. They argued only that Judge Allen should have considered all the evidence presented at the first trial, in addition to the evidence presented at the second, in ruling on the motion. This is a legally distinct argument that is inconsistent with the position appellants have taken on appeal. Appellants have also failed to cite to the trial court or to this court any authority for the proposition that FIE was not permitted to separately challenge the sufficiency of appellants' evidence at the conclusion of each of the two separate evidentiary proceedings. (See *Marshall v. Bankers Life & Casualty Co.* (1992) 2 Cal.4th 1045, 1059 [appellate court generally will not allow a party to raise an

the punitive damages issue and it was to this retrial that the second motion for JNOV was addressed.

II.

The trial court did not err by granting FIE's motion for JNOV.

Even considering the evidence in the light most favorable to appellants, we find no substantial evidence to support the jury's determination that FIE's conduct was malicious or oppressive. (See *Campbell v. Cal-Gard Surety Services, Inc.* (1998) 62 Cal.App.4th 563, 569 [when ruling on motion for JNOV, evidence is viewed in the light most favorable to the party securing the verdict to determine if there is any substantial evidence, or reasonable inferences to be drawn, in support of the verdict]; *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs, supra,* 67 Cal.App.4th 743, 750 [a JNOV motion is a demurrer to the evidence on which the verdict is based; for purposes of a JNOV motion, all evidence supporting the verdict is presumed true and the issue is whether the evidence constitutes a prima facie case or defense as a matter of law].)

An award of punitive damages must be supported by clear and convincing evidence that the defendant acted with fraud, malice or oppression. (Civ. Code, § 3294.) Because the first jury did not find that FIE acted fraudulently, the second jury was required to find either malice or oppression to justify the punitive award. (See *Hale v. Farmers Ins. Exch.* (1974) 42 Cal.App.3d 681, 690 disapproved on other grounds in *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 822, fn. 5.) The governing statute defines "malice" as conduct "intended ... to cause injury" or "despicable conduct" which is carried on with "a willful and conscious disregard of the rights or safety of others," and defines "oppression" as "despicable conduct that subjects a person to cruel

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issue on appeal that was not raised before the trial court]; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 [contentions waived if not supported by sufficient authority].)

and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(1),(2).) "Despicable conduct" is conduct that generates the same character of outrage frequently associated with a crime. (See *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1268 [punitive damages not allowed where offending conduct is result of mistake of law or fact, honest error of judgment, overzealousness, mere negligence or other noniniquitous human failing].) It includes conduct "so mean, vile, base or contemptible that it would be looked down upon and despised by reasonable people." (BAJI No. 14.72.1.) The reprehensible conduct must be more than a failure to act timely, more than an unreasonable or arbitrary investigation and settlement of the insured's claim, and more than a willful and conscious disregard of the insured's interests. (See *Silberg v. California Life Ins. Co.* (1974) 11 Cal.3d 452, 462 [must be more than bad faith conduct]; *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306 [same].)

Here, there is an absence of evidence that FIE or any of its agents acted with the intent to injure the Skatells. The policy coverage disputes were legitimate.[11] The Skatells and FIE disagreed about what benefits should be paid and when. While there was no evidence that FIE did not provide adequate information to the Skatells, there was no evidence of any conduct that remotely could be classed as despicable or that Braxton,

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[11] For some reason, the trial court failed to make coverage rulings during the trial on the merits. In the second trial, most of the rulings on coverage issues were decided in favor of respondents. It is clear from this record that appellants did not understand the contractual limits of their policy and attempted to "push the envelope," as Braxton characterized the Skatells' requests for benefits. There were apparently requests that FIE provide benefits for car repairs, equipment and personal property used for business, the excluded rental properties and other uncovered outbuildings, the services of a seamstress, personal property owned by others, etc. While we express no opinion as to the merits of these claims, we do believe they create legitimate coverage disputes under the policy, which raised issue of law for the court, not issues of fact for a jury. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) In other words, FIE was not raising spurious issues.

Regert or any other agent of FIE held ill feelings against the Skatells or deliberately wished to harm them.

Delayed Benefit Payments

There was evidence that FIE delayed payment of the Skatells' claim. FIE knew that the actual cash value of the Skatells' residence should be paid as soon as possible, because it was certain from the outset that the cost to rebuild would exceed the actual cash value of the home. FIE, nevertheless, waited months before paying the benefits. There was also evidence that FIE delayed paying for lost contents, although the evidence also suggested that much of the lag was the result of the Skatells' failure to provide FIE with a sufficient list of the items lost, a point we address later in the opinion.[12] Even assuming, however, that the jury concluded the delay was unreasonable or arbitrary, this alone did not establish anything more than bad faith conduct and as such was not enough to support the punitive award. (See *Stewart v. Truck Ins. Exchange* (1993) 17 Cal.App.4th 468, 482 [failure to act or unexplained delays in investigation of claim not sufficient for punitive awards]; *Mock v. Michigan Millers Mutual Ins. Co*., *supra*, 4 Cal.App.4th at pp. 323-324 [not actionable if delay in payment of policy benefits is reasonable or with probable cause]; see also *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 892 [careless evaluation of claim and persistent refusal to reconsider its denial of coverage, after its factual errors were identified is not sufficient to support finding of oppression].)

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[12] In December 1996, the Skatells wrote to FIE and complained about the difficulties of preparing a list of lost contents. They said: "Being forced to find and set up alternative temporary housing has stifled our attempt for normalcy during the holidays and also causes the delay of contents listing. Therefore, we will need additional time for this horrendous task." Be that as it may, FIE had every legal right to decline to pay until an adequate proof of loss was submitted. An insurer is not obliged to cave in to an insured's unsupported monetary demand in order to avoid a punitive award.

Failure to Provide Information

There was evidence from which the jury could have concluded that FIE failed to adequately explain to the Skatells the scope of their coverage and the amount of benefits they were entitled to receive, despite a clear obligation to do so. The Skatells testified they did not understand the coverage their policy provided, the distinction between coverage and proof of loss, and the concept of an incurred benefit. When FIE took positions contrary to the Skatells' understanding, FIE failed to clarify or explain why the claims were not being paid, despite many requests by the Skatells that FIE provide them with this information and clear indications from the Skatells that they did not understand FIE's actions.

The Skatells admitted FIE's lack of response was not a complete failure to communicate. Charles testified that Braxton and Regert met with the Skatells on the property almost immediately after the fire and explained in general terms the nature of the coverage. He also testified FIE told the Skatells that the car repair bill would not be covered, that FIE would not pay for a mobile home, and that FIE was terminating ALE benefits after May 15, 1977 (the additional $6,600 the Skatells used to buy the mobile home). The Skatells may not have understood the reasons behind FIE's position, but they knew what that position was.[13] FIE's letters to the Skatells in November 1996 and January 1997 attempted to address some of the questions raised. The jury could have found these attempts by FIE to be inadequate and FIE may have owed the Skatells more information, but FIE's conduct was not despicable. (See *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [malice requires more than willful and

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[13] Charles understood that, if he bought the mobile home with the $6,600, he would not receive any further ALE benefits. He also testified that Braxton told him the car repair bill would not be paid and Braxton was clear that FIE would not buy a mobile home for the Skatells. Braxton sent the Skatells a letter, which they admitted receiving, dated November 27, 1996, in which Braxton explained how the $6,600 figure was derived.

conscious disregard of plaintiff's interests but must include additional component of despicable conduct].)

The Skatells also complained that FIE continued to tell them, during the investigation of the claim, that coverage could not be confirmed. This statement was included as a final paragraph in letters written to the Skatells purporting to update them on their claim's status.[14] Braxton and Parker both testified that this sentence was included in all letters to claimants as a matter of policy before a claim was finalized and was in essence a routine reservation of rights. The two admitted the sentence might have been worded more clearly, but stated it was standard language in the industry. There is no evidence the sentence was added to scare the Skatells, to misinform them, or to otherwise interfere with their rights under the insurance contract. Rita Skatell admitted her fears resulted from not knowing what the language meant and not from any affirmative representation by FIE that the claim was not covered under the policy. She said, "I can't realize it was there to scare us, but it did." Neither Braxton nor Regert ever told the Skatells their claim would not be paid. To the contrary, immediately after the fire, they told the Skatells their loss was covered. The question never was would the claim be paid but how and when it would be paid.

Contents Claim

The Skatells were told they would receive full contents coverage upon submitting an adequate proof of loss. The policy required that insureds submit a detailed list of all the personal property lost, giving the "quantity, description, *actual cash value*, and

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14 The paragraph states: "As your insurer, we recognize our obligation to thoroughly investigate each loss reported to us to determine whether there may exist facts that will allow coverage to be afforded under the terms of the policy. The company will be unable to make a decision whether your claim is covered until we have completed a thorough investigation. This investigation is not intended as, nor should you consider it to be a waiver of any of the conditions, limitations, or exclusions of the policy; a waiver of your obligations under the policy; a waiver of any defenses now or hereafter available to the Company; nor is it an admission or denial of liability."

amount of loss." The Skatells both testified that preparing the contents list was difficult and hard -- undoubtedly true. However, FIE did nothing unlawful or unreasonable, and certainly nothing despicable, in requiring that the Skatells provide documentation as best they could about the items claimed. (Cal. Code Regs., tit.10, § 2695.7, subd. (b) [acknowledging right to require proof of claim -- "upon receiving proof of claim"]; § 2695.10, subd. (b) [payment to be made after receipt of proof of claim].)

The Skatells admitted they were still working on the inventory in December. In March 1997, the Skatells' attorney wrote to FIE explaining that the Skatells were still trying to put together a more detailed list of the lost items. A final list was presented to FIE in May 1997. There were legitimate coverage disputes over some of the items claimed, including items used or intended for use in business, such as the 90 pounds or so of Freon in the garage, personal property belonging to others, and boat items expressly excluded under the policy. In February 1998, FIE was still attempting to clarify the worksheets, which contained broad categories of items such as "men's clothing," "women's jewelry," "food items," etc. Although full payment was not made until later, FIE made several advance payments on contents, one just days after the fire, the second of $3,000 in November 1996, and another of $10,000 in December 1996. It was not despicable for FIE to withhold full payment and refuse to commit to payment for individual items in the absence of a contents list sufficiently detailed to allow a credible valuation of the losses.

FIE did fail to pay $1,000.25 in contents coverage and failed to explain which items on the claim submitted were not paid. However, on this record, we cannot say FIE's conduct was despicable, even though the jury in the first trial concluded FIE's conduct amounted to a bad faith breach of the insurance contract, a verdict which remains unchallenged. It is worth repeating -- bad faith without more is not the type of despicable conduct necessary to support a punitive award. (*Silberg v. California Life Ins. Co., supra,* 11 Cal.3d at p. 462.)

ALE Benefits Dispute

FIE's failure to pay for the mobile home and termination of ALE benefits likewise did not provide a basis for the punitive award. The Skatells argue that FIE engaged in despicable conduct because it failed to consider and document the Skatells' special needs with respect to Dante and unfairly portrayed the Skatells as unreasonable because they did not find temporary housing. For several reasons, these charges do not describe despicable conduct. One, by the Skatells' own admissions at trial,[15] it is clear they wanted FIE to buy them a mobile home to place on the property so that they could return to the exact living arrangements they had before the fire -- living on the same property with Dante.[16] While these intentions were subjectively honorable and understandable under the circumstances, FIE's position that it was not obligated under the policy to purchase a mobile home for the Skatells was a legitimate position given the terms of the policy, which defined ALE benefits as "necessary" expenses. Braxton and Parker explained that purchasing a mobile home was extremely unusual and would leave the Skatells with a retained capital asset not contemplated by the policy. The representatives offered to rent a mobile home for the Skatells and place it on the property, but apparently this was not satisfactory to the Skatells. Though the Skatells may have wanted FIE to do otherwise, FIE's determination not to pay for something the policy did not require cannot by any measure subject FIE to punitives. Adhering to one's legal rights is not despicable conduct.

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[15] See *Mikialian v. City of Los Angeles* (1978) 79 Cal.App.3d 150, 159 [party's unequivocal admissions given great weight in motion for nonsuit]; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21 [party admissions under oath are entitled to greater credibility than regular testimony].

[16] Charles admitted that $1,100 a month was enough to rent a reasonable home comparable to the home the Skatells lost. The dispute was thus not the amount of benefit allotted for temporary housing but rather the failure of FIE to either buy the mobile home or continue to pay the $1,100 long enough to cover the cost of purchasing the mobile home, even after the Skatells were settled back on the property in the mobile home.

Second, FIE's position, including Braxton's notations that the Skatells were being unreasonable, was not arbitrary or despicable under the circumstances. (*Slottow v. American Cas. Co.* (9th Cir. 1993) 10 F.3d 1355 [under California law, insurer's refusal to pay benefits does not serve as basis for punitives where insurer's refusal is supported by a reasonable good faith argument].) The Skatells admitted they did nothing during the first few weeks to secure temporary housing and instead focused on their rental properties.[17] They also admitted that they limited their search to the local weekly paper, did not contact a real estate agent for assistance (other than the one Braxton contacted), and had inspected only one property (the one Braxton located in Bass Lake). The Skatells rejected the Bass Lake property as unsuitable because it was multi-level and not accessible for Dante, but it is undisputed Dante was not part of the Skatells' household before the fire and was not an insured, and there was no intention that he be a member of their household after the fire. It is also undisputed that the burned home was a multi-level home. And, although the Skatells insisted that they wanted to be near Dante to respond to his needs during the night, they had lived in motels several miles from Dante since the fire. They expressed resentment at being "forced" to find alternative housing.[18] They also claimed everything they found was "too hilly," even though the whole of Mariposa County is hilly and their destroyed home had been on a hillside.

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[17] Braxton testified the average time for an insured to find temporary housing -- thus eliminating high hotel and restaurant costs -- was two weeks. Parker said the average was two weeks to a month. This evidence was not disputed. The Skatells did not even begin looking within the three-week period. The Skatells incurred a cost in excess of $2,000 a month for their three-month hotel stay.

[18] The Skatells also minimized FIE's concern about the hotel costs, stating that "it seems as though it's your job to hammer & grind us about such minute things as where we eat and where we are sleeping when all we are trying to do is maintain as best we can." The Skatells also wrote that they were "actively seeking a mobil[e] to put on our property to solve both problems." Thus, their solution to the temporary housing problem was to find a mobile home, which they naively expected FIE to purchase.

It simply was not unreasonable for Braxton and FIE to conclude that the Skatells had rejected the Bass Lake property unjustifiably and that their minimal efforts to find temporary housing were linked to their insistence that FIE buy them a mobile home, a benefit not required by the policy. The Skatells essentially admitted at trial they believed FIE should have agreed to purchase the mobile home and that this was the only interpretation of their ALE benefits they were willing to accept.[19] It was not despicable for Braxton to document his conclusions, even if the jury in the first trial rejected them.

October 4, 1996, Meeting

Appellants argue that Braxton and Regert engaged in despicable conduct during the October 4, 1996, meeting when they laughed at and humiliated Charles Skatell. This is absurd. The record does not support a finding that Braxton's and Regert's conduct was as described and instead supports a finding it fell well short of what could be deemed "despicable." The Skatells testified at trial that Braxton and Regert were "professional," "calm" and "polite" during the meeting and were unwilling to compromise on the matter of ALE benefits, and Charles admitted Braxton was simply "sticking to the policy" and "that's it." We know of no authority that compels an insurer to pay benefits outside the bargained-for agreement represented by the insurance contract just because the insured wants such benefits. (*Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 400 [the terms and conditions of the policy define the duties and performance of the insurer].)

With respect to the assertion that Braxton and Regert laughed at Charles Skatell, Charles testified that he could not say they "broke out in laughter" but that they merely

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19 Charles testified he "really wanted to buy that [mobile]." Rita testified FIE "never paid for the rest of that mobile." They both admitted their intent was to live in the mobile home while their home was being rebuilt and then they would use the mobile to replace the second rental, which was not insured by FIE but had been underinsured at the time of the fire and could not be replaced otherwise. Their letters continued to demand payment in full for the mobile they had purchased.

snickered a few times when Charles presented what he now acknowledges was a "ridiculous" plan based on his misunderstanding of the nature of an incurred benefit and the terms of his policy. Charles asked Braxton and Regert to pay him the limits on the policy so that he would not have to deal with them any more. Charles could point to nothing else during the meeting that might have been considered offensive by a reasonable person. He testified there was no name-calling and nothing offensive was expressly stated. He just "pick[ed] up a bad vibe," and that made him "feel bad."[20] In any event, the existence of despicable conduct does not turn on the particular reactions of the insured to an insurer's physical gesture, particularly in the context of a legitimate refusal by the insurer to pay benefits not required by the policy.

Debris Removal Coverage

In their opening brief, the Skatells identify four reasons why FIE's conduct regarding the debris removal related to their contents claim[21] should be found to support the jury's award of punitives: 1) failure to completely and timely respond to inquiries about coverage; 2) false misrepresentation of the coverage;[22] 3) intentional adjustment of

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[20] Charles testified that Braxton and Regert "just didn't care" and that they "turned against me" but offered nothing the two did or said to justify his conclusions. He also testified it seemed that Regert wanted nothing to do with him after the meeting, but that he did not know whether this was true or not and that he never talked to Regert about it.

[21] The policy also includes debris removal coverage related to the residence, the other structures and landscaping. FIE paid these claims ($2,688, $1,038, and $6,300) and this was explained to the Skatells in a letter dated January 20, 1997.

[22] The Skatells contend that Braxton's misrepresentation was included in the letter dated December 10, 1996, which was "never actually sent, but was included within the claim file to make it appear as though FIE was responsive to the Skatells' inquiries." There is no record citation following this statement, nor have we found any support for it in the record. There was evidence the letter was not received by the Skatells, but no evidence that it was intentionally not sent or that it was placed in the file for fraudulent purposes.

the content claim to $1,000 less policy limits,[23] and 4) failure to pay or explain the debris removal benefits.

FIE did provide information to the Skatells about the debris removal benefits related to contents coverage -- that this would be a different expense and would be calculated when the contents claim was resolved. Thus, the Skatells' argument at trial was that the information provided by FIE was inadequate. There was evidence that Braxton misrepresented the exact nature of the provided-for debris removal/contents coverage. He told the Skatells that they could receive up to an additional 5 percent of their claim for debris removal if the contents portion of the claim exceeded the policy limits. In fact, under the policy the additional 5 percent applied when the contents *and contents related debris removal* exceed policy limits. Braxton testified he was mistaken.[24] However, even if we assume the jury concluded Braxton's statement was intentionally misleading, it was not despicable. First, there were legitimate questions about the coverage. The content debris was intermixed with the structural debris. The bid for rebuilding the home included an amount for debris removal. In addition, the Skatells never submitted a proof of loss related to debris removal. Charles removed much of the debris himself and thus incurred no expenses payable under the policy because debris removal benefits must be incurred. Thus, the misrepresentation, even if intentional, was minimal and was not used as justification for denying any claim. This was not despicable conduct.

Other Contentions

The Skatells also maintain that FIE falsely documented the claim file, discarded recorded statements, deliberately understaffed their offices and delegated to the local

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[23] There is no evidence to support a finding of any plan.

[24] Given the jury's determination that there was no fraud or intentional misrepresentation, it appears the misrepresentation was found to be negligent. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1241 [punitive damages are recoverable for intentional, but not negligent, misrepresentations].)

branch office the authority to decide whether to pay the claim, all of which combined to support the punitive award. First, there was no evidence FIE falsely documented the claim file in order to avoid payment of benefits, particularly given the jury's finding that FIE did not commit fraud. Second, there was no evidence FIE intentionally discarded any documents with the intent to deprive the Skatells of policy benefits. Third, there was no evidence the delays highlighted by the Skatells were caused by staffing inadequacies. Finally, there is no evidence that there was anything unlawful or improper in the practice of allowing the local branch office, which is responsible for the investigation of a claim, to determine whether the claim file contained the necessary documentation to warrant payment of a claim. Parker explained that authorization is often sought with the understanding that further documentation or other conditions must be complete before payment can be made. Moreover, even if there exists authority to pay more, no payment need be made for losses not suffered or expenses not incurred. There was no evidence and no authority for the proposition that such business practices constitute bad faith or are outside industry standards, and, on the record here, none can be characterized as despicable.[25]

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[25] We have reviewed all of the cases cited by appellants and find none to be persuasive because all involved conduct of a distinctly reprehensible nature. *Delgado v. Heritage Life Ins. Co.* (1984) 157 Cal.App.3d 262 involved the complete failure to investigate the claim and respond to the insured's inquiries as to why the insured's claim was rejected. It was decided when a willful and deliberate disregard for the insureds rights alone would support a punitive damage award. This is no longer the law. *Notrica v. State Comp. Ins. Fund* (1999) 70 Cal.App.4th 911 involved widespread unfair and bad faith business practices, including deceit, cover-up and fraud. *Hangarter v. Paul Revere Life Ins. Co*. (N.D.Cal. 2002) 236 F.Supp.2d 1069 involved widespread business practices which fell below industry standards and were intentionally designed to prevent insureds from receiving benefits. *Campbell v. Cal-Gard Surety Services, Inc., supra,* 62 Cal.App.4th 563 involved a complete failure to communicate or investigate claims. *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co*. (1987) 189 Cal.App.3d 1072 was decided under earlier law and included evidence of intentional misrepresentation and fraud. *Brown v. Massachusetts Cas. Ins. Co.* (9th Cir. 2001) 20 Fed.Appx. 735 is an unpublished memorandum decision by the Ninth Circuit that we do not find persuasive,

Conclusion

The trial court correctly found that, as a matter of law, the record disclosed no conduct, alone or cumulative, by FIE that could support an award of punitive damages. Although the Skatells' losses were great and the jury decided that FIE's response was inadequate, there was nothing in the evidence that amounted to the sort of willful, intentional and outrageous actions necessary to a lawful punitive damages award under Civil Code section 3294. An insurer is entitled to stand on the terms of the policy and is not subject to punitive damages by refusing to accede to the insured's own ideas, reasonable or unreasonable, naive or avaricious, about what is fair, necessary or proper under the circumstances, nor is an insurer subject to punitive damages because its stand on policy issues may bruise the particular sensibilities of the insured or defeat an insured's natural desire to be made whole, regardless of the policy's limits on benefits. Despicable conduct is objectively outrageous conduct that results in tangible prejudice to the insured. It is not subjectively insensitive conduct that evokes only a negative emotional response on the part of the insured. Hurting someone's feelings or dashing someone's expectations does not make an insurer liable for punitives.

DISPOSITION

The order appealed from is affirmed. Costs on appeal are awarded to FIE.

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Dibiaso, Acting P.J.

WE CONCUR:

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Harris, J.

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Buckley, J.

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particularly since it fails to analyze whether the conduct in question was despicable within the definition of Civil Code section 3294.